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(26)

No. 05-1256

Supreme Court, U.S.
FILED
SEP 15 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

PHILIP MORRIS USA, **Petitioner,**

v.

MAYOLA WILLIAMS, **Respondent.**

On Writ of Certiorari to the Oregon Supreme Court

Brief of the States of Oregon, California, Maryland, Minnesota, Mississippi, Missouri, Montana, New Mexico, Oklahoma, Utah and Wisconsin Amici Curiae in Support of Respondent

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QUESTIONS PRESENTED

The Oregon Supreme Court determined that:

> Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect – and for two or more decades absolutely knew – that the scheme was damaging the health of a very large group of Oregonians – the smoking public – and was killing a number of that group [including Jesse Williams]. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process.

Williams v. Philip Morris, 340 Or. 35, 63-64, 127 P.3d 1165 (2006) (bracketed material added). Philip Morris contends that the punitive damages award made and affirmed in state court in this case is constitutionally excessive. In this setting, the questions presented are:

1. Whether the Oregon courts deprived Philip Morris of due process "by permitting the jury to punish Philip Morris for harms to non-parties," as Philip Morris claims (Pet. Br. I), or whether the state courts instead properly considered the harm and risk of harm that Philip Morris visited on other Oregonians when assessing the extreme reprehensibility of its conduct.

2. Whether, in considering the claim that this punitive damages award is constitutionally excessive, the Oregon

Supreme Court "disregard[ed] the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm," as Philip Morris puts it (Pet. Br. I), or whether the court instead properly weighed in the balance the pertinent factors that this Court has identified, placing permissible emphasis on Philip Morris's fraudulent, decades-long, and extremely reprehensible conduct.

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INTEREST OF THE STATE *AMICI*

The undersigned Attorneys General submit this brief on behalf of their respective States and pursuant to Rule 37.4. Most States provide, either through case law, by legislation, or both, for the imposition of punitive damages in appropriate cases, and the States are the arbiters, in the first instance, of when punitive damages may be allowed and how they may be assessed. Punishment of wrongdoers and deterrence of repeated misconduct by the tortfeasor and others are the overarching purposes of punitive damages, and the States have a strong interest in furthering those purposes and in punishing and deterring particularly egregious conduct. In addition, some States, including Oregon, provide that a portion of punitive damages awards goes not to the plaintiff, but to the State to be used for public purposes.[1] The State *amici* seek to protect the public benefits that incidentally (or directly) flow from allowing punitive damages awards.

SUMMARY OF ARGUMENT

States have long allowed courts to award punitive damages. This Court has applied the Fourteenth Amendment's Due Process Clause to channel the process by which such damages are imposed. Under the same authority, the Court has reviewed and, rarely, has limited the amount of such damages.

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[1] The States, in addition to Oregon, include Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Missouri, and Utah. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 616-17 (1996) (Ginsburg, J., dissenting) (appendix).

Petitioner Philip Morris artificially underestimates the significance of punitive and multiple damages in relation to the States' interest in deterrence. Through punitive and multiple damages, States seek to deter future injurious conduct, including conduct placing their residents at risk of injury or death. Punitive damages awarded in private litigation serve the public interest in specifically deterring individual wrong-doers from repeating their injurious conduct and in generally deterring other would-be offenders from following or continuing in the path blazed by the punitive damages judgment debtor.

Without support from any precedent of this Court, petitioner seeks to shift the focus from the future *conduct* of persons and entities – including petitioner – to the future *assumed liability* of those accused in hypothetical lawsuits in which state law allows punitive or multiple damages. This Court repeatedly has reaffirmed the legitimacy of the States' interest in deterring future injurious conduct, and the punitive damages awarded in this case further that important state interest.

Petitioner compounds its error by misconstruing the decision of the Oregon Supreme Court in this case. Contrary to petitioner's repeated assertions, the Oregon Supreme Court simply did not allow the jury in this case to punish petitioner for harms to non-parties. Instead, in assessing the reprehensibility of petitioner's long course of fraudulent conduct, the court emphasized the risk that petitioner's conduct posed to all Oregonians and particularly to those who smoke petitioner's product. The Oregon Supreme Court used the harm suffered by Jesse Williams (death from lung cancer) as an exemplar of the

magnitude of the risk to Oregonians created by petitioner's sustained and deliberate fraud. The risk being severe – sickness and death – the state court properly judged petitioner's conduct to be extraordinarily reprehensible and therefore requiring greater punishment and deterrence.

Petitioner suggests that the due process guarantee forbids the States from allowing punitive damages awards of more than four times the amount of compensatory damages. In this case, petitioner proposes that punitive damages properly should not exceed compensatory damages. Petitioner even hints that the constitutional limit in this case approaches zero. Petitioner's suggested holding is inconsistent with this Court's opinions, and is pregnant with risk to state interests in using multiple and punitive damages to specifically and generally deter injurious conduct. The State *amici* submit this brief to rebut petitioner's attempt to hobble and diminish this important tool for social order.

ARGUMENT

I. Due process permits States to use punitive damages to punish past misconduct and to specifically and generally deter future injurious conduct.

A. Punishment and specific and general deterrence

Philip Morris's arguments as to why substantial deterrence is not required here assume that the only deterrence interest served by the punitive damages award in this case is the specific deterrence of Philip Morris. (Pet. Br. 39-40). That assumption is incorrect. As explained be-

low, punitive damages serve societal interests that extend well beyond the interests of the particular plaintiff by deterring other tortfeasors as well.

It has long been recognized that the primary goals of punitive damages awards are to punish the tortfeasor and to deter both the defendant and others from repeated misconduct. In cases where punitive damages are awarded, "'[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.'" *Lake Shore Ry. v. Prentice*, 147 U.S. (40 Davis) 101, 107 (1893), quoting *Wilkes v. Wood*, Lofft 1, 18, 19, 19 Howell's State Trials 1153, 1167 (other citations omitted). "The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized." *Lake Shore Ry.*, 147 U.S. at 107.

> Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct. *See* Restatement (Second) of Torts, § 908 (1979); W. Prosser, *Law of Torts* 9-10 (4th ed. 1971).

Newport v. Fact Concerts Inc., 453 U.S. 247, 266-67 (1987).[2] This Court also has said that punitive damages "'are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (footnote and additional citations omitted).

The idea behind individual deterrence "is that a sufficient sum should be exacted from the defendant to make repetition of the misconduct unlikely." Dan B. Dodds, 2 *The Law of Torts*, § 381, at 1063 (2001). *See also* John J. Kircher & Christine M. Wiseman, 1 *Punitive Damages, Law & Practice*, § 2:07, at 2-15 (2000) ("punitive damages should serve to 'send a message' to the person against whom they are imposed"). General deterrence is based on the theory that punitive damages "will deter

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[2] The Restatement provides that "[p]unitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Restatement (Second) Torts* § 908(1) (1979). "[T]he purposes of exemplary damages are to punish for a past event and to prevent future offenses[.]" *Id.* at § 908(2). The latest edition of Prosser states that punitive damages "are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example." W. Page Keeton (ed), *Prosser and Keeton on the Law of Torts*, ch. 1, § 2, at 9 (5th ed. 1984).

persons other than the actual wrongdoer from engaging in conduct similar to that which occasioned the imposition of the sanction against the wrongdoer." Kircher & Wiseman, 1 *Punitive Damages*, § 2:09, at 2-22 (footnote omitted).

Punitive damages also may serve to deter future misconduct by the defendant and others by giving plaintiffs an incentive to bring actions for damages in situations where criminal prosecution may be unlikely. That is, punitive damages have "the effect of bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor." *Kink v. Combs*, 28 Wis. 2d 65, 80, 135 N.W.2d 789 (1965). Thus, "[p]unitive damages serve not only the aggrieved victim, but also society[.]" *Id. See* Charles T. McCormick, *Damages* §77, at 276 (1935) (an advantage of punitive damages is that they bring punishment to crimes that often are not prosecuted). As the California Supreme Court has explained:

> One recognized purpose of punitive damages is to make a civil action economically feasible. As one commentator has stated: "All serious misdeeds cannot possibly be punished by government prosecution * * *. [Limited] judicial and prosecutorial resources permit prosecution for only a fraction of the crimes and violations committed. For these reasons, individual members of society must play a significant role in instituting actions to impose sanctions for serious misconduct. Society's interest in

> bringing a wrongdoer to justice is especially strong where the wrongdoer's conduct exceeds all bounds of decency. The doctrine of punitive damages promotes this interest. By offering the potential for recovery in excess of actual damages, the doctrine encourages plaintiffs to bring such actions. This is particularly important where actual damages are minimal * * *. Punitive damages thus can be characterized as a reward for the plaintiff's valuable role as a 'private attorney general.' Even where compensatory damages are substantial, an award of punitive damages helps to finance deserving claims by defraying the expenses of the action, such as attorneys' fees, that generally are not recoverable in American courts." Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 649-50 (1980) (fns. omitted).

Dyna-Med, Inc. v. Fair Employment & Housing Comm., 43 Cal. 3d 1379, 1402-03, 241 Cal. Rptr. 67, 743 P.2d 1323 (1987) (bracketed material and ellipses in court's opinion)

B. Due Process allows a State to use punitive damages to deter recidivism and to discourage others from breaking the law by engaging in similar conduct within the State's boundaries.

The Due Process Clause of the Fourteenth Amendment does not bar a State from using punitive and multi-

ple damages to deter the defendant and others from committing egregious misconduct within the State's boundaries. On the contrary, as this Court has stated, "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. A., Inc. v. Gore*, 517 U.S. 559, 568 (1996), citing *Gertz*, 418 U.S. at 350; *Newport*, 453 U.S. at 266-67. A "major," and proper, "objective of punitive damages is to prevent future misconduct." *Newport*, 453 U.S. at 268. Furthermore, "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *BMW*, 517 U.S. at 568.

C. Many States, and the United States, have chosen to use punitive and multiple damages to deter recidivism and to discourage others from breaking the law by engaging in similar conduct.

Every State allows punitive damages at least in some circumstances when authorized by statute.[3] *See generally*

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[3] Michigan, Nebraska, New Hampshire, and Washington are often listed as exceptions. *See, e.g.*, Richard L. Blatt, Robert W. Hammesfahr & Lori S. Nugent, *Punitive Damages* § 7.2B, at 247-48 (2005) (table, citing those States as ones that do not allow punitive damages). Admittedly, in those and some other States the judiciary has looked unfavorably at punitive damages. *McGee v. A C and S, Inc.*, 933 So.2d 770, 783 (La. 2006) ("punitive damages * * * are not allowed under Louisiana law unless expressly provided for by statute"); *City of Lowell v. Massachusetts Bonding & Inc. Co.*, 313 Mass.

Morton F. Daller (editor), *Tort Law Desk Reference* (2006) (canvassing state tort law, including the availability of punitive damages in all 50 States); Linda L. Schleuter, 2 *Punitive Damages*, ch. 20, 147-513 (5th ed. 2005) (same). The United States also provides by statute for punitive damages in numerous instances. Schleuter, 2 *Punitive Damages* § 21.1, at 517 ("A number of federal statutes expressly provide or forbid the recovery of punitive damages") (footnote, giving many examples of such statutes, omitted). The States, and the United States, also provide for awards of multiple damages in certain situations. *See* Schleuter, 2 *Punitive Damages*, ch. 20 (survey-

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257, 47 N.E.2d 265, 272 (1943) ("In this Commonwealth exemplary damages are not allowed unless authorized by statute"); *Birkenshaw v. City of Detroit*, 110 Mich App 500, 313 N.W.2d 334, 339 (Mich. App. 1981) ("In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant * * *. Punitive damages, on the other hand, are not recoverable"); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684, 688 (1960) ("It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed"); *Stewart v. Bader*, ___ A.2d ___, 2006 WL 2404035, *10 (N.H. 2006) ("Punitive damages are not allowed in New Hampshire"); *Stanard v. Bolin*, 88 Wash.2d 614, 565 P.2d 94, 98 (1977) (holding that punitive damages "are not allowed in this state because they are not authorized by statute"). In each instance, however, some statutes have provided for punitive damages. *Punitive Damages*, § 7.32, at 392 & n. 7 (listing Michigan statutory provisions), § 7.37, at 425 & n. 5 (Nebraska statutory provisions), § 7.39, at 434 & n. 5 (New Hampshire); § 7.57B, at 538 & n. 5 (Washington).

ing state law). *See, e.g.*, 15 U.S.C. § 15(a) (multiple damages in antitrust cases); 12 U.S.C. § 1975 (multiple damages available under the Bank Holding Company Act); 18 U.S.C. § 1964(c) (civil RICO).

II. The judgment in this case is consistent with due process.

A. The Oregon Supreme Court properly considered petitioner's conduct in relation to non-parties.

In light of the dual purposes of punitive damages, the judgment in this case is consistent with due process. Using the term "punishment" as a synonym for "liability," Philip Morris casts the Oregon Supreme Court's opinion as assuming liability to non-parties. (*E.g.*, Pet. Br. 11, equating "punish[ment] for harms to" non-parties with liability to those non-parties). Philip Morris then contends that the Oregon Supreme Court violated due process by assuming that Philip Morris would be liable to non-parties. In reality, the state court examined Philip Morris's conduct for a different purpose. Instead of assuming liability to non-parties, the court examined the potential impact of Philip Morris's conduct on unidentified Oregonians who were not parties for the purpose of determining "'the most important indicium of a punitive damages award'"—the reprehensibility of defendant's conduct. *Williams v. Philip Morris Inc.*, 340 Or. 35, 47, 55-56, 127 P.3d 1165 (2006), quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), and *BMW of N. A., Inc. v. Gore*, 517 U.S. at 575. The Oregon Supreme Court observed that in *State Farm* this Court disapproved jury consideration of dissimilar acts

and dissimilar claims in the calculation of reprehensibility, yet acknowledged the relevance of evidence of similar conduct against other parties to the calculation. *Id.* at 52-53, quoting *State Farm*, 538 U.S. at 422-24.

Having determined that the jury "could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct," the Oregon court found that, construing all facts in favor of the prevailing party, Williams, there was "no dispute that Philip Morris's conduct was extraordinarily reprehensible":

> Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century.
>
> Philip Morris's fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill; some would die. Philip Morris's deceit thus would, naturally and inevitably, lead to significant injury or death.
>
> Although it weighs less in our analysis, we also note that Philip Morris harmed a much broader class of Oregonians. Every smoker tricked by its scheme, even those

> who never got ill, kept buying cigarettes—taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies. And every one of those smokers *risked* serious illness or death for as long as they remained deceived.

Williams, 340 Or. at 55-56 (emphasis in original).

The Oregon Supreme Court then proceeded to analyze the remaining factors in *State Farm*. Although there were no comparable civil sanctions available with which to compare Philip Morris's conduct, a comparison of the company's actions to "a familiar crime" was "not speculative or remote." *Id.* at 59. According to the state court, "[v]iewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter" and today "would constitute at least second-degree manslaughter," an offense that when committed by an individual is punishable by up to 10 years in prison and a $250,000 fine. *Id.* at 59-60.

The court recognized that the second *State Farm* guidepost—the ratio between the punitive damage award and the compensatory damage award—did not favor plaintiff and that "[s]ingle-digit ratios may mark the boundary in ordinary cases[.]" *Id.* at 60, 63. But as the court explained, "this is by no means an ordinary case":

> Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an

> extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme.
>
> In summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group.

Id. at 63. Given "such extreme and outrageous circumstances," the court determined, "the other two guideposts—reprehensibility and comparable sanctions"—provided a basis for "overriding the concern that may arise from a double-digit ratio." *Id.*

By focusing on the "extraordinary reprehensibility" of Philip Morris's conduct, the Oregon Supreme Court's due process analysis is consistent with the dual deterrence rationale of punitive damages. The state court's analysis also is consistent with this Court's declared respect for the States' authority to use punitive damages to deter serious unlawful conduct. As this Court explained in *BMW*:

> In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will

> allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. * * * *Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.* * * * For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve.

517 U.S. at 568 (emphasis added; citations omitted).

Similarly, this Court has stated that "a reviewing court engaged in determining whether an award of punitive damages is excessive 'should accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *BMW*, 517 U.S. at 583, quoting *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part). Where fair procedures are followed at trial, "a judgment that is a product of that process is entitled to a strong presumption of validity," if not an irrebuttable presumption, or virtually so. *TXO Prod. Corp. v. Alliance Res. Group*, 509 U.S. 443, 457 (1993). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 40, 42 (1991) (Kennedy, J., con-

curring) (to the extent that jury decisions are unpredictable, respect for the jury's ability to express the sense of the community and "the usual protections given by the laws of the particular State must suffice until judges or legislatures authorized to do so initiate system-wide change"); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) (refusing to "short-circuit" resolution of challenges to punitive damages awards by state's courts or legislature); *Browning-Ferris*, 492 U.S. at 278 (where state law provides basis of decision, state law determines the propriety of punitive damage awards and factors that juries may consider in determining their amounts).

In this case, the Oregon Supreme Court's decision that the jury's $79.5 million punitive damages award was not excessive should be accorded that respect. The relationship between the large award and the State's interests in deterring Philip Morris and other tobacco companies from conduct like that in which Philip Morris engaged could not be clearer. Philip Morris's conduct struck at the heart of the State's most basic obligation to its citizens, namely to protect their health and welfare. Philip Morris sought to undermine the State's ability to do so by placing not only plaintiff, but all smoking Oregonians, in physical danger of illness and death. Philip Morris knowingly spread false or misleading information to keep smokers smoking; engaged in trickery and deceit; continued that course of conduct over a period of decades; and put money into its pockets at the expense of Oregon smokers. The amount of money Philip Morris and other tobacco companies stood to gain from encouraging Oregon smokers to continue habits that the company knew to

be dangerous, Philip Morris's willingness to engage in deceit in order to keep citizens in the smoking "fold," and the length of time in which Philip Morris engaged in its misconduct, make it reasonable to infer that nothing but an extremely large punitive damages award will deter Philip Morris and other tobacco companies from repeating their misconduct in the future. Because the punitive damages award resulted from fair procedures, the state court's decision upholding the jury's award should be upheld.

B. Petitioner is wrong when it claims that a substantial punishment is not needed in this case to advance the interests of punishment and deterrence.

Implicitly recognizing the strong relationship between the State's need for deterrence and the amount of punitive damages that constitutionally may be awarded, Philip Morris argues that "a substantial punishment is not needed to advance the interests of punishment and deterrence." (Pet. Br. 39). In that regard, Philip Morris points out that "[t]he promotional activities of tobacco companies have been closely monitored and regulated for years by Congress and the Federal Trade Commission." (Pet. Br 39). Moreover, the company notes, "Philip Morris has entered into settlements with all 50 States, including a Master Settlement Agreement ('MSA') with 46 States, including Oregon." (Pet. Br. 40). According to Philip Morris, "[t]he combination of federal and state oversight and the terms of the MSA will preclude any repetition of the conduct at issue here." (Pet. Br. 40).

That argument misses the mark in several respects. First, the existence of federal regulation supports, rather than undermines, the importance of substantial punishment in this case. It is, of course, true that "Congress has created a distinct regulatory scheme to address the problem of tobacco and health * * *." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000). The problem for Philip Morris is that *despite* that extensive regulation, it continued the course of conduct that led to Williams' death. This Court has set forth the history of federal regulation of the tobacco industry in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The Court explained that "[i]n 1964, the groundbreaking Report of the Surgeon General's Advisory Committee on Smoking and Health concluded that '[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.'" *Id.* at 542, quoting Department of Health, Education and Welfare, U.S. Surgeon General's Advisory Committee, Smoking and Health 33.

> In 1965, Congress enacted the [Federal Cigarette Labeling and Advertising Act (FCLAA)] as a proactive measure in the face of impending regulation by federal agencies and the States. Pub L.89-92, 79 Stat 282. * * * The purpose of the FCLAA was twofold: to inform the public adequately about the hazards of cigarette smoking, and to protect the national economy from interference due to diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to

> the relationship between smoking and health. Pub L 89-92, § 2.

Id. at 541-42 (citation omitted).

The 1965 version of the FCLAA prescribed a label for cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health"; required the Secretary of Health, Education and Welfare (HEW) to report to Congress about the health consequences of smoking and the advertising and promotion of cigarettes; and contained a pre-emption provision prohibiting any requirement of additional cautionary statements on cigarette packaging. *Id.* at 543. Between 1965 and 1969, the HEW Secretary recommended certain amendments to the FCLAA, and "House and Senate committees held hearings about the health effects of cigarette smoking and advertising by the cigarette industry." *Id.* at 543-44. "The final result was the Public Health Cigarette Act of 1969," in which Congress made several changes to the FCLAA. *Id.* at 544. The amendments strengthened the warning required on cigarette packages to: "Warning. The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health"; prohibited advertising of cigarettes on media that was subject to the FCC; and included a pre-emption requirement proscribing state laws based on smoking and health with respect to advertising or promoting cigarettes. *Id.*

Finally, "[i]n 1984, Congress again amended the FCLAA in the Comprehensive Smoking Education Act. Pub L 98-474, 98 Stat 2200." *Id.* at 545. "The purpose of the Act was to 'provide a new strategy for making Americans more aware of any adverse health effects of

smoking, to assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking.'" *Id.* "The Act established a series of warnings to appear on a rotating basis on cigarette packages and in cigarette advertising, § 4, and directed the Health and Human Services Secretary to create and implement an educational program about the health effects of cigarette smoking, § 3." *Id.* In the years following that amendment to the FCLAA, "[t]he FTC has continued to report on trade practices in the cigarette industry," including noting that in 1999, the first year since the master settlement agreement, the cigarette industry made the largest expenditure ever on advertising and promotions. *Id.*

In short, as Philip Morris contends, regulation of advertising by the cigarette industry has been in effect continuously since 1965. But Williams did not die until 1997. *Williams*, 340 Or. at 38. In the meantime, Philip Morris was part of two "organizations [that] developed and promoted an extensive campaign to counter the effects of negative scientific information on cigarette sales." *Williams*, 340 Or. at 40-41. In 1964, the year of the Surgeon General's report on the health hazards of smoking, the industry created the Council on Tobacco Research, which "designed its research program to avoid studying the biological effects of tobacco use, the very question that, according to the industry's statements, required more research." *Id.* at 40. According to Philip Morris's director of research in the late 1970's and 1980's, "his job was to attack outside research that was inconsistent with the industry's position by casting doubt on it." *Id.* at 40-41. "At least by the 1970's, there was ab-

solutely no scientific basis for denying the connection between cigarette smoking and cancer and other diseases. However, [Philip Morris] continued to assert that the hazard of cigarette smoking to health was uncertain when it actually knew that there was no legitimate controversy about that subject." *Id.* at 41. "Even after the early 1990's, when the industry finally had to admit that tobacco could be a risk factor associated with a number of diseases, it argued that there was a long chain of intervening events before a disease actually arose from cigarette smoking" and "continued to deny that cigarette smoking was addictive." *Id.* at 42. Williams continued to rely on Philip Morris's deceitful advertising practices, and he died partially as a result of them. *Id.* at 42.

In light of that history, Philip Morris's present contention that it was sufficiently deterred by federal regulations does not withstand scrutiny. The purpose of the 1984 amendments to the FCLAA was to "assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking." *Lorillard Tobacco Co.*, 533 U.S. at 545. Philip Morris did everything in its power to defeat those purposes. This case demonstrates the inadequacy of federal regulations to deter Philip Morris from its assault on Oregon citizens' ability to evaluate the true health risks of smoking. The State's interest in deterring Philip Morris from repeating such conduct is manifest and appropriate.

Philip Morris's argument also assumes that the only interest served by the award is the specific deterrence of Philip Morris. But general deterrence is also a legitimate

and important goal of punitive damages, and Philip Morris's argument is silent with respect to that state interest. Because the value of punitive damages in deterring other would-be tortfeasors is also part of the constitutional calculus, the facts that Philip Morris is highly regulated and has entered into the MSA are not conclusive in determining whether the award is excessive.

Finally, Philip Morris cannot credibly invoke the monetary elements of the MSA to claim that substantial punitive damages are not necessary to deter it from engaging in further instances of the misconduct that occurred here. Evidently, Philip Morris assumes that the monetary payments required by the MSA are directed toward deterring it from future misconduct. That assumption is unwarranted given the plain language of the MSA, which states, in relevant part:

> (d) Payments in Settlement. All payments to be made by the Participating Manufacturers pursuant to this Agreement are in settlement of all of the Settling States' antitrust, consumer protection, common law negligence, statutory, common law and equitable claims for monetary, restitutionary, equitable and injunctive relief alleged by the Settling States with respect to the year of payment or earlier years, except that *no part of any payment under this Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced*

> *damages* or is the cost of a tangible or intangible asset or other future benefit.

MSA § XVIII (d) (emphasis added).[4] That language is inconsistent with the view that MSA payments are in part a substitute for punitive damages. Accordingly, they should not be viewed as a substitute for the deterrence that punitive damages provide.

It also bears noting that, under Or. Rev. Stat. § 31.735, 60 percent of each punitive damages award in Oregon is allocated to the State's Criminal Injuries Compensation Account. In this litigation, Philip Morris has taken the position that the MSA "provides for a release (or, in the alternative, an offset) of the State of Oregon's portion of the punitive damages verdict and judgment[.]" (Jt. App. 292a). Oregon disputes that claim. However, if Philip Morris were to prevail on that argument, it might be subject to a far smaller punitive damages award than the jury awarded. Because under those circumstances the award's deterrent effect could be proportionally decreased, the MSA does not logically support a decrease in the amount of punitive damages awarded.

CONCLUSION

"[E]xemplary damages imposed on a defendant should reflect 'the enormity of his offense.'" *BMW*, 517 U.S. at 575, quoting *Day v. Woodworth*, 54 U.S. 363, 13 How 363, 371 (1852). "[S]ome wrongs are more blameworthy than others." *Id.* In this case, the Oregon Supreme

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[4] The Master Settlement Agreement is available online at http://www.naag.org.

Court properly determined that the jury fashioned the punishment to fit Philip Morris's egregious actions. Given that the touchstone of due process is a "concern for reasonableness," the Oregon Supreme Court's decision should be affirmed and the $79.5 million punitive damages award against Philip Morris upheld. *See TXO*, 509 U.S. at 458, citing *Haslip*, 499 U.S. at 18 (reviewing the petitioner's "excessive fines" claim with "concerns for reasonableness" in mind).

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September 15, 2006

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APPENDIX A

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